OCTOBER TERM, [illegible]

FEDERAL TRADE COMMISSION,
Petitioner,

v.

BROWN SHOE COMPANY, INC.,
Respondent.

RESPONDENT'S BRIEF IN [illegible] PETITION FOR A WRIT OF [illegible] UNITED STATES COURT OF APPEALS [illegible] EIGHTH CIRCUIT

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No. 1141.

IN THE

SUPREME COURT OF THE UNITED STATES.

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QUESTION PRESENTED.

It appears that Petitioner has misconceived the scope and effect of, and the basis for, the judgment sought to be reviewed. Because of such misconception, under the caption "Question Presented", page 2, the question which is presented on this petition has been incorrectly stated.

"Pet. p. .." refers to the Petition for Writ of Certiorari. "Pet. A., p .." refers to the opinion of the Court of Appeals set forth as Appendix A to the Petition for Writ of Certiorari. "R. p. .." refers to the three volume record in the Court of Appeals.

As we shall point out below, the question is not whether the Court of Appeals has applied an unduly narrow construction of the Commission's powers under Section 5 of the Federal Trade Commission Act, which it did not, but rather whether the decision of the Court of Appeals that there was no adequate evidentiary basis for the Federal Trade Commission's findings should be reviewed by this Court.

STATEMENT.

Under the caption "Statement" (Pet. pp. 3-9), Petitioner summarizes some of the facts found by the Commission upon which it based its conclusion that the Franchise Stores Program of Brown Shoe Company (Brown) constituted an unfair method of competition.

We understand that this Court will not issue its writ of certiorari merely for the purpose of reviewing the correctness of a decision of a Court of Appeals as to whether there was or was not an adequate evidentiary basis for the Federal Trade Commission's findings. Accordingly, we will not here undertake to discuss or amplify the Petitioner's statement with respect to the evidence offered before the Commission, with one exception.

On Pet. p. 8 the statement is made that "The court did not reject the Commission's findings as to the anticompetitive effect of the Brown Shoe franchise plan." We suggest that an examination of the Court's opinion, briefly discussed below, will show that the Court did affirmatively reject the Commission's findings and held that they were without adequate evidentiary support.

REASONS FOR DENYING THE WRIT.

Under the caption "Reasons for Granting the Writ", Pet. pp. 9-11, the Petitioner states, first—

> "The court of appeals has significantly and improperly restricted the power of the Federal Trade

Commission under Section 5 of the Federal Trade Commission Act to deal with anticompetitive practices. Without considering the effect upon competition of the substantial market foreclosure which the Brown Shoe franchise plan caused, the court ruled that the Commission could not condemn the plan as an unfair method of competition under Section 5 because (1) under *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, such purchase plans 'have never heretofore been "regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly" • • •' (App. A, *infra*, p. 14a); and, because (2) in the court's view, they did not constitute tying or exclusive dealing arrangements that violated the Sherman or Clayton Acts."

and, second—

"In addition, the case warrants review in order to effectuate this Court's decision in *Brown Shoe Co. v. United States*, 370 U. S. 294."

In neither instance has the Court of Appeals decided an important question of Federal law which has not been, but should be, settled by the Supreme Court; nor decided a Federal question in a way probably in conflict with applicable decisions of the Supreme Court. Instead, the only important question of Federal law involved has been settled long since by this Court, and the decision below merely applies the principles enunciated in the controlling decisions of this Court to the facts of this particular case.

Answer to Petitioner's First Reason for Granting the Writ.

Petitioner points out (Pet. p. 3, Footnote 1a), referring to the decision of the Court reversing a Commission finding on Count II of the Complaint:

> "Since that determination depended upon the substantiality of evidence to establish particular facts, review of it is not sought in this petition."

Similarly, an examination of the opinion of the Court below reversing the Commission's finding with respect to Count I of the Complaint, will show that the Court's determination with respect to Count I of the Complaint also depended merely "upon the substantiality of evidence to establish particular facts." We do not understand that this Court will grant certiorari merely for the purpose of reviewing decisions of Courts of Appeals with respect to the substantiality of evidence to establish particular facts.

The real difficulty with the Commission's case against the Brown Franchise Stores Program has been caused by failure of proof. In its Complaint, in Count I, the Commission charged (R. pp. 5, 6), in substance, that the agreements, written and oral, between Brown and the operators of the Brown Franchise Stores, were exclusive dealing agreements, such as are prohibited by Section 3 of the Clayton Act, and for that reason constituted unfair methods of competition under Section 5 of the Federal Trade Commission Act. The case was tried before the Hearing Examiner upon that theory. The witnesses offered by the Commission, except for three of Brown's officials who testified with respect to the details and operation of the Brown Franchise Stores Plan, consisted solely of six officials of other shoe manufacturers, competitors of Brown, who testified with respect to their difficulty in selling shoes to the operators of Brown Franchise Stores. Not a single present or former operator of a Brown Franchise Store was called as a witness by the Commission.

Brown Shoe Company offered the testimony of thirty-four present and two former operators of Brown Franchise Stores (R. pp. 291-348, 389-483, 502-668, 677-686), and the Hearing Examiner refused to accept the testimony of

additional witnesses along the same lines (R. pp. 653-5, 667-8).

In his opening statement Counsel Supporting the Complaint stated, with respect to Count I, inter alia,

> "Brown has entered into a contract which requires this group of customers **to deal exclusively with them to the exclusion of all other competitors** producing and attempting to sell similar types of shoes"* (R. 91-A).

Counsel Supporting the Complaint also stated that, after an operator had been dropped from the program

> "* * * the Brown Company does not then refuse to sell the franchisee shoes. They will continue to sell him shoes, but they deny him certain services which he was granted **on the condition that he deal exclusively**" (R. 91-A).

Again Counsel Supporting the Complaint stated

> "The effect of this contract and Brown operations under this contract is to foreclose and exclude competitors from a substantial segment of the shoe market * * * that Brown does enforce these **exclusive-dealing contracts** with approximately 700 of its customers. Without more this is a violation of the Federal Trade Commission Act, section 5" (R. 91-B).

The taking of testimony commenced on March 16, 1960 (R. p. 92), and was not completed until October 30, 1961 (R. p. 69), at which time the Hearing Examiner was still under the impression that the charge in Count II of the Complaint was under Section 5 of the Federal Trade Commission Act, but that the charge in Count I was a charge of exclusive dealing under Section 3 of the Clayton Act. Thus, when counsel for the Company said

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* Emphasis ours here and throughout this Brief except where otherwise indicated.

"Well, I believe that inasmuch as this is a Section 5 proceeding and we are charged with some type of unfair trade practice——"

the Hearing Examiner said

"Well, a Section 5 charge is the resale price maintenance. **The other charge is under Section 3, isn't it?**" (R. 688).

As pointed out by the Court of Appeals (Pet. A, pp. 10a-11a), the Commission, finding itself unable to agree with its Hearing Examiner's findings that the Brown Franchise Stores Program was an unlawful exclusive dealing arrangement, struck such findings of the Examiner and substituted its own findings to the effect that the plan "effectively foreclosed its competitors from selling to a significant number of retail shoe stores" because the operation of such plan is "akin to the operation of tying clauses generally held as inherently anti-competitive," and for that reason violated Section 5 of the Act (R. p. 73). In other words, the Commission could not, upon the evidence before it, find that the agreements or understandings between Brown and the operators of the Brown Franchise Stores constituted exclusive dealing agreements, as charged in Count I of the Complaint, and as Counsel Supporting the Complaint endeavored to prove. Nor could it find that they constituted tying clauses, but was reduced to finding that they effectively foreclosed competitors merely because they were "akin" to the operation of tying clauses.

Apparently the Commission found this kinship, as pointed out by the Court of Appeals (Pet. A, p. 9a), in the fact that the evidence showed that the relationship between Brown and the operators of the franchise stores was "a reasonably stable one" (R. p. 68), and because of such stability, competitors were effectively foreclosed.

It was because the Court of Appeals determined that this finding of kinship to a tying arrangement was without "adequate evidentiary basis" that the Court of Appeals reversed the Commission, and not because the Court of Appeals was undertaking to or did restrict the power of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act to deal with anti-competitive practices. The decision does not restrict or limit the power of the Commission beyond holding that the Commission's findings of fact must have an adequate evidentiary basis.

Examining the opinion of the Court of Appeals, we see that it stated (Pet. A, p. 2a):

> "The Commission alleged that the 'purpose, intent or effect' of such practices on the part of Brown was 'substantially to lessen, hinder, restrain and suppress competition' in the distribution of shoes in interstate commerce and in general to **'foreclose'** or **'exclude'** competitors from a 'substantial share' of the retail dealer market, thereby further enhancing the already powerful competitive position of Brown in the shoe industry."

The Court of Appeals then pointed out (Pet. A, p. 9a), that the essence of the Commission's decision with respect to Count I of the Complaint was as follows:

> "In sum, the Commission held that petitioner's operation of its franchise program, which it found **effectively foreclosed competitors** from making substantial sales to a significant number of desirable retail outlets, constituted an unfair trade practice in violation of § 5 of the Federal Trade Commission Act."

Noting the theory upon which the Commission tried the case, as indicated above, the Court of Appeals said (Pet. A, p. 10a):

> "When this case was first instituted on October 13, 1959, it obviously was the theory of the Federal Trade Commission that Brown's franchise stores program was an unlawful **exclusive dealing arrangement** violative of § 5 of the Act. It was so found by the Hearing Examiner and decided by him on that basis."

The Court of Appeals then pointed out that the Commission refused to go along with the Hearing Examiner, saying (Pet. A, pp. 10a-11a):

> "The Commission struck such findings of the Examiner, stating:
>
> > " 'In short, from our review of the record, we find that respondent's operation of the franchise plan, which has effectively foreclosed its competitors from selling to a significant number of retail shoe stores, constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act. Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anti-competitive.' "

Having reviewed, at some length, the pleadings, the evidence, the Examiner's decision, and the Commission's findings, and having cited this Court's decision in the case of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 647, with respect to the purpose of the Federal Trade Commission Act, the Court of Appeals expressly stated that the primary question with which it was concerned was merely the adequacy of the evidence to support the Commission's findings, saying (Pet. A, p. 11a):

> "Our primary question is whether there was adequate evidentiary basis for the Commission's finding that the Brown franchise program was an unfair method of competition and accordingly unlawful under § 5 of the Act."

Then, before undertaking to examine the evidence, the Court of Appeals, further emphasizing its opinion that its primary concern was with the adequacy of such evidence, pointed out that the Act itself provides, 15 U. S. C. A. § 45 (c), that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive; and quoted (Pet. A, p. 12a) from the opinion of this Court in the case of *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 488, where it was held that a reviewing Court may set aside a Board decision,

> "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Having thus defined the question with which the Court of Appeals was concerned as being one with respect to the adequacy of the evidence, and having indicated its recognition of the limitations of a reviewing Court in passing upon the adequacy or substantiality of the evidence, the Court of Appeals proceeded to review such evidence, and after having done so concluded (Pet. A, p. 21a):

> "We hold that the Brown franchise stores program was not an unlawful tying arrangement and that there was a complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act."

In the course of such review the Court of Appeals pointed out that historically the validity of such pro-

grams had never been challenged, saying (Pet. A. pp. 13a-14a):

> "What Brown did in the operation of its Brown franchise stores program it had been doing for at least thirty years prior to the institution of this proceeding. Similar programs are operated by its competitors, such as International Shoe Company's Merchants Service Plan and General Shoe Company's General Shoes Friendly Franchise Store Plan. No Court has gone so far as to hold like programs or methods of doing business unlawful under § 5 of the Federal Trade Commission Act and such programs or sales methods have never heretofore been '* * * regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.' 253 U. S. at page 427."

Petitioner asserts, (Pet. pp. 11-12), that in making this statement with respect to the long established practice in the shoe industry the Court of Appeals relied upon the case of *Federal Trade Commission v. Gratz*, 253 U. S. 421, and ignored this Court's post-*Gratz* decisions, such as *Federal Trade Commission v. Cement Institute*, 333 U. S. 683; *Federal Trade Commission v. Motion Picture Adv. Serv. Co.*, 344 U. S. 392; *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457; and *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349. But the Court of Appeals did not rely upon *Gratz* beyond pointing out that the Brown Franchise Plan met the test of *Gratz*. However, having so held, the Court of Appeals went on to examine the evidence and to point out the complete absence of any market foreclosure of Brown's competitors other than that resulting from the fact that the operators of the Brown Franchise Stores, though free to leave the

program at any time, voluntarily remain on the program because it helps to make them successful and profitable operators. Thus the Court of Appeals said (Pet. A, p. 15a);

> "Retailers were free to abandon the arrangement at any time they saw it to their advantage so to do."

(Pet. A, pp. 17a-18a):

> "In Brown there was no 'sale' of the **tying** product (franchise services); there is no evidence that Brown's 'power or leverage' in the tying product was such as to force the purchase of the 'tied products' (shoes). This case presents a situation where the seller, Brown, has no control or dominance over the tying product, services; consequently, the Brown franchise program is not an 'effectual weapon' to pressure buyers into taking the tied item, shoes."

(Pet. A, p. 19a):

> "Brown's franchise program was not the only program available to retailers. It did not give Brown the economic leverage to force the sale of its shoes. * * * There is nothing specialized or unique about the services offered by Brown."

(Pet. A, p. 19a):

> "Brown has not 'acquired' the retail outlets of those who join its program. The latter are free to leave it at any time."

As for the post-*Gratz* decisions, in *Cement Institute* it was contended that the Commission did not have jurisdiction under Section 5 of the Federal Trade Commission Act because the acts complained of violated Section 1 of the Sherman Act. This Court rejected such contention.

In *Motion Picture Adv. Serv. Co.* it was contended that exclusive dealing contracts (which would violate

Section 3 of the Clayton Act) were not within the coverage of Section 5 of the Federal Trade Commission Act. This Court rejected such contention.

In *Keppel & Bro.*, a "lottery or gambling device which encourages gambling among children" was held to come within the coverage of Section 5 of the Federal Trade Commission Act.

In *Fashion Originators' Guild* a combination of manufacturers who sold their products under exclusive dealing agreements which violated Section 3 of the Clayton Act was held to come within the scope of Section 5 of the Federal Trade Commission Act.

In *Bunte Bros.*, Section 5 of the Federal Trade Commission Act was held to be inapplicable to purely intrastate transactions.

In all of such decisions this Court pointed out that the term unfair competition is a flexible concept, not precisely defined by the statute, but to be defined with particularity by the Courts in the many cases coming before them. There is nothing in the decision of the Court of Appeals in the present case in conflict with any of such post-*Gratz* cases.

Since the decision of the Court of Appeals was merely a decision that there was not an adequate evidentiary basis to support a finding of the Commission, the statement of Mr. Justice Holmes in the case of *United States v. Johnston*, 268 U. S. 220, 227, that "We do not grant a certiorari to review evidence and discuss specific facts" would appear to be particularly applicable to the petition now before this Court.

Again this Court said, in *General Pictures Co. v. Electric Co.*, 304 U. S. 175, l. c. 178:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

See also *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521, 537 (dissenting opinion by Mr. Justice Frankfurter) and cases cited therein.

Answer to Petitioner's Second Reason for Granting the Writ.

A complete answer to Petitioner's assertion that "the case warrants review in order to effectuate this Court's decision in *Brown Shoe Co. v. United States*" (Pet. p. 11), is the fact that the divestiture by Brown of the Kinney Stores, so ordered by this Court, has long since been carried out.

In this connection Petitioner asserts (Pet. pp. 15-16), that this Court in *Brown Shoe Co., Inc. v. United States*, 370 U. S. 294, concluded that "in light of the structure of the shoe industry which demonstrates a definite trend toward vertical integration, the preemption by Brown of several hundred retail dealers as its exclusive dealers tends substantially to lessen competition."

The fact is that this Court did no such thing. In *Brown Shoe* this Court was examining into the probable effect upon competition in the shoe industry of the "acquisition" by Brown of the Kinney stores. In making such examination this Court took into consideration as one of the elements of such competition the relationship between Brown and the operators of the Brown Franchise Stores, and held that, l. c. 338, Footnote 66:

> "Brown was able to exercise sufficient control over these stores * * * to warrant their characterization as 'Brown' outlets for the purpose of measuring the share and effect of Brown's competition at the retail level."

But this Court did not hold, or even intimate, that the operation of the Brown Franchise Stores Program consti-

tuted an unfair method of competition, or was otherwise illegal; or even, as stated by petitioner, that Brown had preempted such operators as its exclusive dealers. The issue as to the legality or illegality of the Brown Franchise Stores Program was not tried in the District Court, was not before this Court, and was not decided in *Brown Shoe*.

In the present case, where the issue was before the Court of Appeals, the Court of Appeals has expressly found, upon the evidence, that there was no preemption of the market because the operators were free to leave the program at any time, and that the operators were not Brown's exclusive dealers. As the Court of Appeals said (Pet. A, p. 19a):

> "The only similarity between this case and the previous Brown Shoe Co. decision, supra, is the fact that the same corporation is involved in both disputes."

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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